Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROBERT MICHAEL DAMPTS,

Petitioner,

v.

ARNOLD HOLT and J.C. JILES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the dismissal of a writ of habeas corpus pursuant to 28 U.S.C. §2254 as amended by the Anti-Terrorism and Effective Death Penalty Act (AEDPA) 28 U.S.C. §2244(d) violate due process where the grace period for such filing was announced in an unpublished opinion after the grace period had already passed?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF CITED AUTHORITIES iii

PRAYER 1

CITATION OF OPINION IN THE APPELLATE COURT 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS 2

STATUTES 2

STATEMENT OF THE CASE 3

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE 6

REASONS FOR GRANTING THE WRIT:

1. It is not permissible to announce and impose the grace period after the grace period had already expired because it deprives a person in Petitioner's position of due process and the opportunity to take advantage of the grace period 6

CONCLUSION 9

APPENDIX ..... *infra*

TABLE OF CITED AUTHORITIES

Cases PAGE

Calderon v. U.S. Dist. Ct. for Central Dist. of Cal., 128 F.3d 1283 (9th Cir. 1997) 8

Heideman v. PFL, Inc., 904 F.2d 1262 (8th Cir. 1990) 8

Jackson v. Deloach, C.A. 96-0914-CB-S (S.D. Ala. May 7, 1997) 6

Kelly v. National Labor Relations Board, 79 F.3d 1238 (1st Cir. 1996) 7

Constitutional Provision

U.S. Const., Amend. V 2

Statutes

28 U.S.C. 2244 2-3

28 U.S.C. 2254 3

PRAYER

Petitioner, Robert Michael Dampts, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on the 6th day of November 1998 affirming the District Court's dismissal of Petitioner's petition for habeas corpus relief and in support thereof states the following:

CITATION OF OPINION IN THE APPELLATE COURT

No. 98-6029 (U.S.C.A. 11th Cir.) (unpublished) was decided on November 6, 1998. Petitioner's timely petition for rehearing was denied on January 11, 1999.

JURISDICTION

1. The judgment and opinion Petitioner seeks review of is that of the United States Court of Appeals for the Eleventh Circuit entered on the 6th day of November 1998.

2. The United States Court of Appeals for the Eleventh Circuit denied the Petitioner's Petition for Rehearing on the 11th day of January 1999.

3. The statutory provision that confers jurisdiction on this Court to review this petition for a writ of certiorari is 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

28 U.S.C. 2244. Finality of determination

. . . (d)

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recog-

nized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

On May 26, 1992, in the Circuit Court of Mobile County, Alabama, Thirteenth Judicial Circuit, the petitioner-appellant entered a blind plea of guilty to two charges of robbery in the first degree and two charges of burglary in the first degree. He entered the blind plea on the advice of his attorney who had assured him that he "could get" the Petitioner a sentence of fifteen years on his plea of guilty. Before pleading guilty, the Petitioner signed a "Motion to Enter Guilty Plea" form which read "I further understand that after I am sentenced on my guilty plea that I still have a right to appeal from such sentence and if I am indigent, the

court will furnish me a copy of the transcript of the sentence proceedings and will furnish me with an attorney."

On July 10, 1992, the Petitioner appeared before the court for sentencing whereupon the judge stated: "Mr. Dampts, the court sentences you to serve a term in the State Penitentiary for life." All told, the Petitioner received four concurrent life sentences.

On November 23, 1992, from his prison cell in Fountain Correctional Center, the Petitioner penned a request to the Circuit Court of Mobile County, Mobile, Alabama asking for the records from all four of his cases as well as free transcripts of the proceedings held in each case and case action summaries. The reason that he gave for requesting these documents was that "he is trying to get the cases back in to the court and the records and transcripts of records are needed to aid the petitioner in these legal matter."[sic] Attached to the motion was an oath of pauperis and forma pauperis in which the Petitioner explained that he was "without means of any income asept a state dollar in which the State of Alabama gives him once a month,"[sic] and that he had "no stocks or bonds or savings account nor property, nor car house, to sell to pay any filing fee or any court cost for said motion for transcripts of court records et al." The Petitioner's motion for free transcripts was denied on January 8, 1993.

In February 1996, the petitioner-appellant's family retained present counsel, Elliott T. Price, to represent petitioner-appellant in the instant action.

On April 24, 1996, the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-

132, 110 Stat. 1214 (codified as amended at 28 U.S.C. 2244 and 2254) was enacted.

In October 1996, counsel for the Petitioner received "what appears to be the entirety of the [Petitioner's] court files that were and are in the possession of the clerk of the circuit of Mobile County, Alabama, Thirteenth Judicial Circuit."

On May 7, 1997, the United States District Court for the Southern District of Alabama, Southern Division, in an unpublished opinion and order recognized a one-year grace period for filing habeas petitions after the enactment of the AEDPA; the unpublished opinion and order, however, noted that the grace period had expired 14 days prior on April 23, 1997.

The Petitioner filed his petition for habeas corpus relief pursuant to 28 U.S.C. 2254 and an accompanying memorandum of law in the United States District Court for the Southern District of Alabama, Southern Division on August 5, 1997. On October 10, 1997, the Respondents filed their answer and on October 31, 1997, they filed a supplemental answer.

The United States Magistrate Judge William H. Steele filed his Report and Recommendation with the district court on November 20, 1997. The Petitioner filed a statement of objection to the Report and Recommendation of the magistrate judge, and a supporting brief, on December 5, 1997.

On December 10, 1997, the United States District Court Judge Richard W. Volimer, Jr. entered an order adopting the Report and Recommendation as the opinion of the court and dismissing the Petitioner's petition

brought pursuant to 28 U.S.C. 2254 as time-barred pursuant to 28 U.S.C. 2244(d).

On January 8, 1998, the Petitioner filed a notice of appeal and a motion for certificate of appealability.

United States District Court Judge Richard W. Volimer, Jr., granted the motion for certificate of appealability on May 21, 1998.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The appeal was from the final order of the United States District Court for the Southern District of Alabama, Southern Division, dismissing the petition brought by Petitioner pursuant to 28 U.S.C. 2254. The appellate court had jurisdiction pursuant to 28 U.S.C. 2253(a) and (c) and Rule 22(b) of the Federal Rules of Appellate Procedure. The United States District Court for the Southern District of Alabama, Southern Division, granted Petitioner's motion for certificate of appealability.

REASONS FOR GRANTING THE WRIT

1. It is not permissible to announce and impose the grace period after the grace period had already expired because it deprives a person in Petitioner's position of due process and the opportunity to take advantage of the grace period.

On May 7, 1997, the United States District Court for the Southern District of Alabama, Southern Division, decided *Jackson v. Deloach*, C.A. 96-0914-CB-S (S.D. Ala. May 7, 1997), an **unpublished** order which im-

posed a one-year grace period for filing habeas petitions in the wake of the AEDPA; the decision also held that the grace period it had just announced and imposed had expired fourteen days prior on April 23, 1997. *Jackson* at page 5.

The grace period thus announced and imposed in *Jackson* was nothing short of worthless for the petitioner-appellant and others in his position. Neither the petitioner nor anyone in his position had the opportunity to take advantage of the grace period because by the time that it was announced and imposed the time for filing had already passed. This is also assuming that petitioner could even have found out about the secretive decision of the Eleventh Circuit.

It has been said that the purpose for adopting the "grace period" was "to avoid any severe injustice." Ironically, for the petitioner and others in his position, the grace period has caused nothing but "severe injustice."

Tolling the grace period for enough time to render the petitioner's section 2254 petition timely under the AEDPA is the proper and equitable remedy because the petitioner and others in his position did not have, nor could they have had, actual or constructive notice of the grace period and its filing requirement prior to its expiration.

Among the factors that the courts consider in assessing claims of equitable tolling are the plaintiff's lack of actual and/or constructive notice of the filing requirements. *Kelly v. National Labor Relations Board*, 79 F.3d 1238, 1248 (1st Cir. 1996).

The petitioner in this case had no actual notice of the grace period and its filing requirement, i.e., file on or

before April 23, 1997, because the grace period and its filing requirement were not "announced and imposed" until 14 days after it had expired, and even then the "announcement and imposition" amounted to nothing more than an unpublished opinion and order.

For the same reason, the petitioner did not have constructive notice of the grace period and its filing requirements.

Equitable tolling is available where extraordinary circumstances beyond a prisoner's control make it impossible to file a petition on time. *Calderon v. U.S. Dist. Ct. for Central Dist. of Cal.*, 128 F.3d 1283, 1288 (9th Cir. 1997).

Equitable tolling is appropriate when the circumstances that caused the plaintiff to miss a filing deadline are out of his hands. *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990).

The petitioner and others in his position could not have filed their petitions on time and could not have avoided missing the tolling of section 101's statute of limitation. *Calderon*, 128 F.3d at 1289.

Remembering that the purpose of the doctrine of equitable tolling is to shelter the plaintiff from the statute of limitations where strict application would be inequitable, it becomes clear that tolling the grace period for enough time to render the petitioner's section 2254 petition timely under the Act is the proper and equitable remedy where the petitioner and others in his position did not have, nor could they have had, actual and/or constructive notice of the grace period and its filing requirement prior to its expiration, and the dis-

trict court's failure to so utilize the doctrine of equitable tolling was an abuse of discretion.

Since AEDPA did not provide for any grace period at all and terminated all rights to file a habeas corpus petition (which previously had no such time limit) except for those prisoners who were still within the one-year period prescribed by AEDPA, the circuits were at liberty to allow or disallow a grace period of any length. It so happened that the circuits that published a grace period adopted a one-year period to conform with the period in the statute, but a longer or shorter period could easily have been announced as well.

Thus, if a circuit was to create a grace period in the name of justice, it should publish the new policy in a manner that the citizenry would reasonably hear about it and as soon as the policy took effect, not after it already expired!

CONCLUSION

For the reasons stated above, the petitioner, Robert Michael Dampts, urges that this petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX TABLE OF CONTENTS

App. Page

Opinion of the United States Court of Appeals for the Eleventh Circuit, November 6, 1998 1

Report and Recommendation of the Magistrate Judge, United States District Court for the Southern District of Alabama, November 19, 1997 6

Order and Judgment of the United States District Court for the Southern District of Alabama, December 10, 1997 12

Order of the United States District Court for the Southern District of Alabama, May 21, 1998 (attached to the Order was the Opinion and Order in *Jackson v. Deloach*, (S.D.Ala. No. 96-0914-CB-S, May 7, 1997) 14

Order of the United States Court of Appeals for the Eleventh Circuit Denying Rehearing, January 11, 1999 24

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6029
Non-Argument Calendar

D.C. Docket No. 97-Cv-723-RV-S

ROBERT MICHAEL DAMPTS,

Petitioner-Appellant,

versus

ARNOLD HOLT; J.C. JILES,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Alabama

(November 6, 1998)

Before TJOFLAT and EDMONDSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM: Robert Michael Dampts appeals the dismissal of his petition for habeas relief pursuant to 28 U.S.C. § 2254. The district court dismissed his petition as untimely because it was filed more that a year after the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).

Dampts is a state prisoner who was convicted of two counts of first degree robbery and two counts of first

degree burglary on May 26, 1992. He was sentenced to life in prison for each count, with each term to run concurrently. He never directly appealed his conviction and has never filed a petition for state post-conviction relief. He filed this habeas petition in federal district court on August 5, 1997. On appeal Dampts contends that state prisoners whose convictions became final prior to the enactment of the AEDPA should be allowed a one year grace period in which to comply with the new limitations period and that the one year grace period can be equitably tolled where circumstances warrant.

The AEDPA was enacted on April 23, 1996 and imposed a one-year limitations period on all habeas petitions filed after its effective date 28 U.S.C. § 2244(d). The limitations period begins to run on the date on which the judgment of conviction becomes final by the conclusion of direct review or the expiration of the time for seeking such review. *Id.*[1]

All courts of appeal that have considered this issue have declared that for those prisoners whose convictions became final prior to the passage of the AEDPA, the one-year limitations period begins to run from the effective date of the statute. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998) (holding that "prisoners should have been accorded a period of one year after the effective date of the AEDPA in which to file a first § 2254 petition or a § 2255 motion); *Burns v. Morton*,

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[1] The statute lists several instances where the one-year period begins later than the date of a final judgment of conviction but none of those circumstances are relevant here. *See* 28 U.S.C. § 2244(d)(1)(A)-(D).

134 F.3d 109, 111 (3d Cir. 1998) (allowing one-year grace period for § 2254 petitions); *U.S. v. Flores*, 135 F.3d 1000, 1006 (5th Cir. 1998) (adopting one-year grace period for § 2255 motions); *Calderon v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 128 F.3d 1283, 1287 (9th Cir. 1997) (holding that the one-year period of limitation included in AEDPA amendment to 28 U.S.C. § 2244 "d[oes] not begin to run against any state prisoner prior to the statute's date of enactment"), *cert. denied*, 118 S. Ct. 899 (1998); *Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), *rev'd on other grounds*, 521 U.S. 320 (1997); *O'Connor v. U.S.*, 133 F.3d 548, 550 (7th Cir. 1998) (reaffirming *Lindh's* conclusion that a one-year grace period applies to federal prisoner's § 2255 motions); *U.S. v. Simmonds*, 111 F.3d 737, 746 (10th Cir. 1997) (same).

While this court has not considered the precise issue presented by this case, it has interpreted the identical limitations period that applies to federal prisoners seeking collateral review of their convictions under 28 U.S.C. § 2255. In *Goodman v. U.S.*, 151 F.3d 1335 (11th Cir. 1998), this court recently held that federal prisoners whose convictions became final prior to the AEDPA's passage would have a one-year grace period in which to file motions attacking their convictions under § 2255.

We see no reason not to follow this court's reasoning in *Goodman*, as well as that of all of the other circuits that have considered the issue, and hold that state prisoners whose convictions became final prior to April 23, 1996 had a one-year grace period in which to file habeas petitions under § 2254.

For Dampts, this grace period expired before his petition was filed in August of 1997. To combat this deficiency Dampts asserts that the grace period should be equitably tolled where proper circumstances warrant such a tolling. Other courts have allowed a tolling of the one-year grace period where equity has mandated such a result. *See Miller v. New Jersey State Dep't. of Corrections*, 145 F.3d 616, 617 (3d Cir. 1998) (finding one-year period to be a statute of limitations subject to equitable tolling and tolling the period for prisoner who was in transit between institutions and could not file until after April 23, 1997); *Calderon*, 128 F.3d at 1289 (also finding one-year period to be a limitations period rather than a jurisdictional bar and allowing tolling past April 23, 1997 where petitioner's counsel had to be replaced causing an unavoidable delay). However, we decline to decide this issue because Dampts has presented no compelling reasons for such a tolling. His sole contention is that he had neither actual nor constructive notice of the grace period or the AEDPA's new filing requirements. However, the fact that he obtained counsel in February of 1996, prior to the passage of the AEDPA, makes his assertions less potent. *See Kelley v. N.L.R.B.*, 79 3d 1238, 1249 (1st Cir. 1996) ("Courts generally impute constructive knowledge of filing and service requirements to plaintiffs who, like appellant, consult with an attorney."). Furthermore prisoners throughout the country became aware of the AEDPA's requirements, and the decisions in other circuits put them on notice that a one-year grace period would likely be the limit for future habeas petitions. *See Ross*, 150 F.3d at 102 (noting that as many pro se § 2254 petitions were filed in one district between April 1,

1997 through April 24, 1997, the last day of the grace period, as were filed in all of 1996).

Because Dampts has presented no equitable reasons why the one-year grace period should be tolled in this case, we must affirm the district court's dismissal of his petition.

AFFIRMED.

[Dated November 19, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT MICHAEL DAMPTS,	:	
	:	
Petitioner,	:	
vs.	:	
	:	CIVIL ACTION
	:	97-0723-RV-S
ARNOLD HOLT, Warden, and	:	
J.C. JILES, Warden of the	:	
Bullock Correctional Center,	:	
Union Springs, Alabama,	:	
	:	
Respondents.	:	

REPORT AND RECOMMENDATION

Petitioner Robert Michael Dampts, AIS #183259, a state prisoner in the custody of Respondent Warden Arnold Holt at Bullock Correctional Facility, has petitioned this Court for federal *habeas corpus* relief pursuant to 28 U.S.C. § 2254 (docs. 1, 2). The petition has been referred to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B), Local Rule 72.2, and the standing order of general reference. It is recommended that the petition be dismissed as time barred pursuant to 28 U.S.C. § 2244(d).

Petitioner's action, challenging his July 10, 1992 conviction in the Circuit Court of Mobile County, Alabama, for two counts of robbery, first degree and two counts of burglary, first degree for which he was

sentenced to four concurrent terms of life in prison, was initiated subsequent to the April 24, 1996 enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("Act") which amended, in pertinent part, 28 U.S.C. § 2244. The petition was served upon Respondents, (docs. 7-9, 11), and an Answer (doc. 10) and a Supplemental Answer (doc. 12) have been filed.

A review of the Court file reflects that the relevant facts are not in dispute. On May 26, 1992, Petitioner pleaded guilty to the two robbery and the two burglary charges (doc. 10). On July 10, 1992, Petitioner was sentenced to four concurrent life sentences. To date, Petitioner has not directly appealed his conviction, nor has he sought post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure.

On November 23, 1992, Petitioner filed, in the Circuit, a *pro se* "Motion for free Transcripts of Case[ ]s AND Records! And All records of Case Action Summary Sheets" seeking "report of proceedings for purpose of challenging imposition of four life sentences" (docs. 1-2). On January 8, 1993, Petitioner's Motion was denied although Petitioner was forwarded the case action summaries (docs. 1-2). In February 1996, Petitioner's family retained counsel and Petitioner's court records were obtained by his counsel in October 1996 (doc. 2). On August 5, 1997, Petitioner's counsel filed the instant action seeking federal *habeas corpus* relief from the Court.

Pursuant to 28 U.S.C. § 2244(d)(1) as amended by the Act, a one year statute of limitation is applicable to an application for a writ of *habeas corpus* by a person in custody on a judgment of a State court. The limitation period shall run from the latest of—

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such state action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right, has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2244(d)(1). A properly filed application for state post-conviction review tolls the one year time period. § 2244(d)(2) ("[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.").

Simply put, under § 2244(d), a state inmate seeking federal *habeas corpus* relief is required to file his petition within one year of the date his process of direct review became final. *Calderon v. U.S. District Court for the Central District of California*, 112 F.3d 386, 389 (9th Cir. 1997). Not withstanding, a number of federal Circuits have held that the one year limitation period may be applied retroactively, provided that the petitioner has been given a reasonable period of time after the Act's effective date to file his petition. *Calderon* 112 F.3d at 389; *Peterson v. Demskie,* 107 F.3d 92 (2nd Cir.

1997); *United States v. Lopez*, 100 F.3d 113 (10th Cir. 1996) (interpreting parallel § 2255 limitation period contained in the Act); *see Hunter v. U.S.*, 101 F.3d 1565, 1573, n. 6 (11th Cir.), *cert. denied sub nom. Nagle v. Bailey*, ___ U.S. ___, 117 S.Ct. 1695, 137 L.Ed.2d (1997); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *cert. granted, in part on other grounds*, ___ U.S. ___, 117 S.Ct. 726, 136 L.Ed.2d 643, *judgment reversed*, ___ U.S. ___, 117 S.Ct 2059, 138 L.Ed.2d 481, *remanded to* 124 F.3d 899 (7th Cir.), *petition for cert. filed* No. 97-613 (Oct. 7, 1997); *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996). To avoid any sever injustice, this Court adopted a one year "grace-period" from the enactment date of the Act, suspending the effective one-year time period until April 24, 1997. *See Jackson v. DeLoach*, C.A. 96-0914-CB-S (S.D.Ala. May 7, 1997) (currently pending).[1]

As reflected by the procedural history presented, Petitioner was sentenced on July 10, 1992. Because Petitioner did not seek direct review or collateral review by the State, his conviction became final on August 21, 1992, 42 days after the pronouncement of his sentence. Ala.R.App.P. 4(b)(1).

The instant petition was not filed until August 5, 1997, approximately five years from the date Petition-

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[1] On October 29, 1997, the Ninth Circuit amended *Calderon*, 112 F.3d 386, concluding that, "along with the Second with the Second and Seventh Circuits—[the Act's] one-year time limit did not begin to run against any state prisoner prior to the statute's date of enactment." *Calderon*, ___ F.3d ___ (1997 WL 671283, *4) (*citing Reyes*, 90 F.3d 676; *Lindh*, 96 F.3d 385; and *Lopez*, 100 F.3d 113). "No petition filed on or before April 23, 1997—one year from the date of [the Act]—may be dismissed for failure to comply with the [statutory] time limit." *Id.*

er's conviction became final, over one year and three months after the effective date of the Act, and approximately three months beyond this Court's extended "grace-period." Petitioner did not avail himself of any of the tolling provisions of 28 U.S.C. § 2244(d).

Petitioner alleges, pursuant to § 2244(d)(1)(B), that a State created impediment prevented his filing for relief earlier and, pursuant to § 2244(d)(1)(D), that the factual predicate of his claims was not discovered through due diligence until his attorney obtained the transcripts in October 1996. However, in the instant action the procedural history reflects that after the Mobile County Circuit Court denied Petitioner's motion for free transcripts in January 1993, three years of inactivity passed. Despite Petitioner's first-hand knowledge of his own circumstances, he took no action to challenge his conviction.[2] Petitioner's family retained counsel three years later and court records were obtained in October 1996. Even so, the instant petition was not filed until August 5, 1997, approximately three months beyond this Court's extended grace period.

Moreover, in *Calderon,* the Ninth Circuit stated that "equitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary

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[2] In the instant petition, Petitioner asserts that he was deprived of his right of appeal, that he received ineffective assistance of counsel, that his sentence is excessive and disproportionate, and that conditioning early release on the payment of restitution violates the Constitution. These claims would have been, and were, available to Petitioner immediately following his conviction notwithstanding the accessibility of transcripts and yet Petitioner took no action on his own behalf after January 1993.

circumstances' beyond a prisoner's control make it impossible to file a petition on time." *Calderon*, (1997 WL 671283, *6). In *Calderon*, the petitioner's lead counsel had diligently pursued the preparation of his position; however, counsel withdrew after accepting employment in another state, and much of the work product was not useable by replacement counsel. According to the Ninth Circuit, this was "a turn of events over which [the petitioner] had no control." *Id.* at *7. The Ninth Circuit determined that there were "extraordinary circumstances" which justified tolling the statute. *Id.*

In the instant action, the procedural history reflects the presence no such "extraordinary circumstances." Further, Petitioner does not allege extraordinary circumstances approximating the nature of the circumstances alleged in *Calderon*. As such, and because the instant petition was filed beyond the one-year statute of limitation pursuant § 2244(d), and beyond this Court's adopted "grace-period," the petition is time barred.

The attached sheet contains important information regarding objections to this Recommendation.

DONE the 19th day of November, 1997.

/s/ William H. Steele
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT MICHAEL DAMPTS,	:	
	:	
Petitioner,	:	
vs.	:	
	:	CIVIL ACTION
	:	97-0723-RV-S
ARNOLD HOLT, Warden, and	:	
J.C. JILES, Warden of the	:	
Bullock Correctional Center,	:	
Union Springs, Alabama,	:	
	:	
Respondents.	:	

ORDER

After due and proper consideration of all portions of this file deemed relevant to the issues raised, and a *de novo* determination of those portions of the Report and Recommendation to which objection is made, the Report and Recommendation of the Magistrate Judge made under 28 U.S.C. § 636(b)(1)(B) is ADOPTED as the opinion of this Court. It is ORDERED that this petition brought pursuant to 28 U.S.C. § 2254 by Petitioner Robert Michael Dampts be and is hereby DISMISSED as time barred pursuant to 28 U.S.C. § 2244(d).

DONE this 10 day of Dec., 1997.

/s/ Richard W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT MICHAEL DAMPTS,	:	
	:	
Petitioner,	:	
vs.	:	
	:	CIVIL ACTION
	:	97-0723-RV-S
ARNOLD HOLT, Warden, and	:	
J.C. JILES, Warden of the	:	
Bullock Correctional Center,	:	
Union Springs, Alabama,	:	
	:	
Respondents.	:	

JUDGMENT

It is ORDERED, ADJUDGED, and DECREED that the petition brought pursuant to 28 U.S.C. § 2254 by Petitioner Robert Michael Dampts be and is hereby DISMISSED as time barred pursuant to 28 U.S.C. § 2244(d). No costs are to be taxed.

DONE this 10 day of Dec., 1997.

/s/ Richard W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE

JUDGEMENT ENTERED
ON DOCKET

Date 12/11/97
DEBORAH S. HUNT
CLERK

App. 14

[Dated May 21, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ROBERT MICHAEL DAMPTS,	:	
	:	
Petitioner,	:	
vs.	:	
	:	CIVIL ACTION
	:	97-0723-RV-S
ARNOLD HOLT, Warden, and	:	
J.C. JILES, Warden of the	:	
Bullock Correctional Center,	:	
Union Springs, Alabama,	:	
	:	
Respondents.	:	

ORDER

This matter is before the court on petitioner Robert Michael Dampts' "Motion for Certificate of Appealability." (doc. 21). After due consideration, it is

ORDERED that the motion is GRANTED, and petitioner is hereby ISSUED a certificate of appealability under 28 U.S.C. § 2253(c)(1) & (2).

The facts relevant to the appeal are essentially undisputed and are more fully set forth in the report and recommendation of the Magistrate Judge, (doc. 14), which the court adopted as the opinion of this court after a *de novo* review. (Docs. 18 & 19). However, the court summarizes the salient facts to lay the predicate for the issues on appeal:

Upon his blind plea to charges of multiple counts of robbery and burglary, petitioner was convicted on July

10, 1992, by the Circuit Court of Mobile County, Alabama, and was sentenced to four concurrent life terms. Petitioner did not file a direct appeal of the conviction or the sentence and did not seek post-conviction relief under Ala.R.Crim.P. 32. Thus, pursuant to Ala.R.App.P. 4(b)(1), petitioner's conviction became final on August 21, 1992, 42 days after his sentencing.

On August 5, 1997, petitioner filed this, his first, federal habeas petition, approximately five years from the date petitioner's conviction and sentencing became final, more than one year and three months after the effective date (April 24, 1996) of the Anti-Terrorism and Effective Death Penalty Act of 1996 (the Act), and approximately three months after the one-year "grace period" imposed by this court under which petitions otherwise time-barred by the Act are deemed to be timely if filed any time prior to April 24, 1997, one year after the Act's effective date.[1]

Prior to the Act, a prisoner generally had no deadline by which to file a federal habeas petition. Now, however, the Act requires a state inmate seeking federal habeas review to file his petition within one year of the date his process of direct review became final. 28 U.S.C. § 2244(d). Thus, because petitioner's conviction and sen-

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[1] The one-year grace period was originally announced by the chief judge of this district in an unpublished order, issued in *Jackson v. Deloach,* (S.D.Ala. civil action No. 96-0914-CB-S) (copy attached). After due consideration, the undersigned judge agreed that the one-year grace period was warranted and reasonable, and through the adoption of the report and recommendation in which the Magistrate Judge recommended the imposition of the grace period, has imposed the one-year grace period as its own ruling.

tence became final on August 21, 1992, he had until August 21, 1993, to file a federal habeas petition, if the Act is applied retroactively.[2] In order to offset the harshness which would result in the retroactive application of the Act's one-year filing deadline to prisoners whose convictions and sentences had been final for more than a year but who had not filed non-capital habeas petitions prior to the Act's effective date, a number of courts have held that the one-year limitation period may by applied retroactively, provided that the petitioner has been given a "reasonable" period of time after the Act's effective date to file his petition. *See* the case citations in the adopted report and recommendation. (Doc. 14). As previously noted, the undersigned judge has determined that one year is a "reasonable" period of time, and thus, at least in cases filed on this judge's docket, a petitioner in mr. Dampts' position had to have filed his petition on or before April 24, 1997, for the petition to be timely.[3]

In accordance with 28 U.S.C. § 2253(c)(3), the court specifies the issues as follows:

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[2] This case is distinguishable from *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997), in which the United States Supreme Court held that the Act could not be applied retroactively to non-capital § 2254 petitions which were pending on the date the Act became effective. Here, as already noted, petitioner filed his non-capital § 2254 petition *after* the Act's effective dates.

[3] One of the concerns voiced by petitioner regarding the one-year "grace period" is that the grace period was announced *after* the expiration of the grace period (which ended on April 24, 1997).

1. Whether the one-year limitations period established by the Anti-Terrorism and Effective Death Penalty Act in 28 U.S.C. § 2244(d) operates as a procedural bar to non-capital 28 U.S.C. § 2254 petitions filed (a) more than one year after the direct appeal of petitioner's conviction and sentencing becomes final (or more than one year after the deadline for filing a direct appeal in cases in which no direct appeal is filed?) AND (b) after the effective date of the Act?

If the answer to question 1 is no, the second issue is:

2. How long after the effective date of the Act does a person in petitioner's position (a prisoner who seeks to file a non-capital 28 U.S.C. § 2254 petition more than one year after the direct appeal of his conviction and sentencing becomes final or more than one year after the deadline for filing a direct appeal in which no direct appeal was filed) have to file a timely 28 U.S.C. § 2254 petition? More specifically, is a one-year "grace-period" a reasonable period of time in which to allow a person in petitioner's position to file his § 2254 petition timely under the Act, and if so, is it permissible to announce and impose the grace period after the expiration of the grace period?

DONE this the 21st day of May, 1998.

/s/ Richard W. Vollmer, Jr.
UNITED STATES
DISTRICT JUDGE

[Opinion and Order of May 7, 1997
attached to the Order of May 21, 1998]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ARMOND JOSEPH JACKSON,	)	
	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	
	)	96-0914-CB-S
	)	
JAMES DELOACH,	)	
	)	
Defendant.	)	

OPINION AND ORDER

This matter is before the Court on petitioner's objection to the Report and Recommendation of the Magistrate Judge. The Magistrate Judge has recommended that the habeas petition filed by petitioner be dismissed as time-barred. In so doing, the Magistrate Judge applied the one-year statute of limitations enacted in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2244, 2254 and 2255). Petitioner argues that the one-year statute of limitations has a retroactive effect and should not be applied because it would deprive him of his ability to litigate his habeas claims. Because this is an issue of first impression for this Court, the undersigned has conducted its own research of the emerging law in this area in addition to its review of the Report and Recommendation and petitioner's objections thereto. For the reasons

set forth below, the Court finds that the petition is not time-barred.

The relevant facts are not in dispute. Petitioner pled guilty to capital murder and, after a sentencing trial, was sentenced to a term of life imprisonment on April 7, 1983. Petitioner appealed his conviction and, the conviction was affirmed on April 24, 1984. On September 28, 1992, petitioner filed a petition for post-conviction relief in state court. The denial of collateral relief in state court was affirmed by the Court of Criminal Appeals on March 26, 1993, and petitioner filed no further appeals. Petitioner filed the instant habeas petition seeking relief pursuant to 28 U.S.C. § 2254 on September 18, 1996.

Prior to AEDPA "state prisoners had almost unfettered discretion in deciding when to file a federal habeas petition." *Calderon v. United States District Court for the Central District of California*, ___ F.3d ___, 1997 WL 194546 at *2 (9th Cir. April 17, 1997). AEDPA creates a one-year limitations period within which a state prisoner may file his petition for habeas relief in federal court pursuant to 28 U.S.C. § 2254.[1]

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[1] The limitation period begins to run from the latest of the following events:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by state action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(continued...)

Whether this limitation period applies retroactively to cases in which the one-year period had run before April 24, 1996, AEDPA's effective date, has been the subject of disagreement among courts.

Four circuits have now held that the AEDPA's limitation period may be applied retroactively, *provided that the petitioner has been given a reasonable period of time after the Act's effective date to file his petition. See Calderon v. United States*, 1997 WL 197546 (9th Cir. April 17, 1997); *Peterson v. Demskie*, 107 F.3d 92 (2nd Cir. 1997); *United States v. Lopez*, 100 F.3d 113 (10th Cir. 1996) (interpreting parallel § 2255 limitation period contained in AEDPA); *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc);[2] *Reyes v. Keane*, 90 F.3d

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[1] (...continued)

> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2441(d)(1). The time during which a "properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending" is excludable from in calculating the one-year period. 28 U.S.C. § 2441(d)(2).

[2] While the Seventh Circuit's statements in *Lindh* were technically *dicta*, the court left little room for doubt as to its position:

> Courts treat a reduction in the statute of limitations as a rule for new cases only. *See Landgraf*, 511 U.S. at ___
>
> (continued...)

676 (2d Cir. 1996). To this Court's knowledge, no other circuit has adopted the view suggested by the Magistrate Judge that the limitation period should be applied retroactively without any grace period.[3] Moreover, the Court agrees with the Second Circuit's assessment that "it would be entirely unfair and a severe instance of retroactivity to apply . . . the new requirement of the AEDPA that a habeas petition be filed within one year after completion of state court direct review where that period ended before the effective date of the Act" unless those affected are given a reasonable amount of time to file their petitions. *Reyes*, 90 F.3d at 679.

Courts do not necessarily agree as to what constitutes a reasonable amount of time for filing claims which accrued more than one year prior to AEDPA's effective date. The Seventh Circuit has determined that one year

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[2] (...continued)

> n.29, 114 S.Ct. at 1502 n.29. And although no decision of the Supreme Court addresses the issue, we do not doubt that the Court would give a plaintiff who files after the enactment a reasonable post-amendment time to get litigation underway. A new statute is unlike a judicial construction of an existing statute, which . . . governs all pending cases. Section 2244(d) is short enough that the "reasonable time" after April 24, 1996 and the one-year statutory period coalesce; reliance interests lead us to conclude that no collateral attack filed by April 23, 1997, may be dismissed under § 2244(d) and the parallel provision added to 28 U.S.C. § 2255 by § 105 of the 1996 Act.

Lindh, 96 F.3d at 866 (emphasis added).

[3] A few district courts have adopted this approach. *See, e.g., Clarke v. United States*, 955 F. Supp. 593 (E.D. Va. 1997) (interpreting parallel § 2255 limitation period); *Curtis v. Class*, 939 F. Supp. (D.S.D. 1996) (§ 2254); *United States v. Bazemore*, 929 F. Supp. 1567 (S.D. Ga. 1996) (§ 2255).

is a reasonable amount of time. *Lindh*, 96 F.3d at 866. On the other hand, the Second Circuit has stated that "where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year after the effective date of the AEDPA. At the same time, we do not think that the alternative of a 'reasonable time' should be applied with undue rigor." *Peterson*, 107 F.3d at 93. The *Peterson* court went on to hold that a petition filed seventy-two days after AEDPA's effective date was not time-barred.

In this Court's opinion, the one-year period adopted by the Seventh Circuit in *Lindh* is the better-reasoned approach. *Peterson* suggests that "reasonableness" is a case-by-case determination which depends, in part, on the amount of time the prisoner had to bring his petition prior to the enactment of AEDPA. Such an approach would be difficult to apply and would be likely to produce arbitrary results.[4] On the other hand, the Act's limitation provision should have put prisoners on notice that one year is a sufficient period of time within which to file their claims. Moreover, the one-year period promotes uniformity.

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[4] For instance, would a prisoner as to whom the limitation period expired ten years prior to the effective date be given less time to file his petition than one whose limitation period expired only one year prior to the effective date? *Peterson* seems to suggest this result. *See Peterson*, 1997 WL 55841 at *2 ("In circumstances like [petitioner's], where a state prisoner has had several years to contemplate bringing a federal habeas corpus petition, we see no need to accord a full year. . .").

In summary, the Court finds that AEDPA's limitation period bars a state prisoner's federal habeas petition based on claims which arose more than one year prior to the statute's enactment unless the petition is filed on or before April 23, 1997, Because the instant petition was filed prior to this date, it is not time-barred. Accordingly, the Court OVERRULES the recommendation of the Magistrate Judge.

It is so ORDERED.

DONE this the 7th day of May 1997.

/s/ Charles R. Butler
CHIEF DISTRICT JUDGE

App. 24

[Filed January 11, 1999]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-06029

ROBERT MICHAEL DAMPTS,

Petitioner-Appellant,

Versus

ARNOLD HOLT, J.C. JILES,

Respondents-Appellees.

On Appeal from the United States District Court
for the Southern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: TJOFLAT and EDMONSON, Circuit Judges, and GODBOLD, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure; Eleventh Circuit Rule 35-5), the suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ John C. Godbold
UNITED STATES SENIOR
CIRCUIT JUDGE